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Doe v. Commonwealth's Attorney: A Set-back for the Right of Privacy

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DOE V. COMMONWEALTH'S ATTORNEY: A SET-BACK FOR THE RIGHT OF PRIVACY

Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respected individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo de Vinci, etc.). It is a great injustice to persecute homosexuality as a crime, and cruelty too.¹

Sigmund Freud in a
letter to an American
mother.

I. INTRODUCTION

Historically, the American attitude towards sexuality has been diagnosed as erotophobic, or as having "exaggerated anxieties and fears of sexual behavior of all types with inordinate attempts to place such activities under societal regulations."² This phobia has its historical basis in the Judeo-Christian ethic of Western Europe, an influence transmitted here and strengthened by the early Puritan Movement.³ Its manifestations are the current body of state laws which proscribe "crimes against nature," or "unnatural" or "abnormal" sexual relations.⁴ While most sodomy statutes apply equally to both heterosexuals and homosexuals,⁵ it is usually only the latter who suffer arrest and conviction for the activities included in such

¹ 107 AM. J. PSYCH. 786, 786-87 (1951).

² M. WEINBERG & C. WILLIAMS, MALE HOMOSEXUALITY: THEIR PROBLEMS AND ADAPTATIONS 31 (1974).

³ *Id.* at 32; W. CHURCHILL, HOMOSEXUAL BEHAVIOR AMONG MALES 199-229 (1967) [hereinafter cited as CHURCHILL].

⁴ H.F. Pilpel, *Sex vs. the Law*, in STUDIES IN HUMAN SEXUAL BEHAVIOR 65 (A. Shiloh ed. 1970) [hereinafter cited as Pilpel].

Such "abnormal sexual relations" may include anal intercourse, fellatio, cunnilingus, mutual masturbation, sex with animals or fowl, or sex with the dead, depending on the statute and case law of the jurisdiction.

⁵ CHURCHILL, *supra* note 3, at 225; Note, *The Constitutionality of Laws Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974).

statutes.⁶ An individual convicted of performing a homosexual act faces the possibility of a jail sentence from a few months to twenty years depending on the jurisdiction.⁷ Other jurisdictions label a homosexual a "sexual psychopath" and require him to undergo involuntary hospitalization until he is "cured."⁸ Even after the individual has paid his debt to society, the stigma attached to the crime and conviction act as further punishment resulting in family disgrace, social ostracism, and subsequent difficulty in finding and keeping employment.⁹

⁶ CHURCHILL, *supra* note 3, at 225; Comment, *California's "Consenting Adults" Law: The Sex Act in Perspective*, 13 SAN DIEGO L. REV. 439 (1976).

⁷ Special Student Contribution, *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273, 278 (1971) [hereinafter cited as *Overview*].

⁸ WEINBERG & WILLIAMS, *supra* note 2, at 33.

The enforcement of "sexual psychopath" legislation against homosexuals has been criticized. First, what constitutes a "sexual psychopath?"

The term "sexual psychopath" should be strictly limited to those individuals who practice violence, fraud, exploitation, or coercion in connection with sexual gratification. It should not be applied to individuals who may merely be described as neurotic, eccentric, immoral, or unconventional in their sexual behavior, or to individuals who confine their sexual activities to acts practiced in private with the consent of the partner.

CHURCHILL, *supra* note 3, at 223.

Furthermore, the object of this legislation is to treat and not punish the "sexual psychopath." However, there is still no "cure" for homosexuality. See Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private Consenting Adult Homosexual Behavior Be Excluded?*, 30 MD. L. REV. 91, 112 (1970). As a result, an "uncured" homosexual could be held for treatment indefinitely. "Such an individual would be better off if he were sentenced under ordinary criminal statutes since there would at least be some limitation to the term of his sentence." CHURCHILL *supra* note 3, at 224.

⁹ A. KARLEN, *SEXUALITY AND HOMOSEXUALITY* 609-11 (1971); WEST, *HOMOSEXUALITY* 102-03 (1967); Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687, 691-92 (1973).

Once convicted or once their condition becomes known to the relevant authorities, male sex deviants (like the leprous or the insane) must expect some legal and social restrictions. If they work in certain fields, such as teaching, or governmental posts involving security risk, they will lose their jobs. If they belong to a profession with strict disciplinary rules, like solicitors and medical men, they may have their license to practice taken away. They will not be accepted for admission to the armed forces or the merchant navy, they will be found unsuitable for a wide range of employments such as police, prison service, youth workers and so forth. They will never be considered for important posts in politics or public life. They may even encounter difficulties if they want to enter as students at a university. They will be rejected if they apply to immigrate to another country.

WEST at 91.

Currently, thirty-four states make private homosexual behavior between consenting adults subject to criminal sanction.¹⁰ The validity of such laws has recently come under scrutiny.¹¹ It is argued that whether an individual chooses to engage in such conduct is a question of that person's own moral judgment, not for the state's determination.¹² This argument does not seem radical in a country that arguably recognizes a constitutional right of privacy,¹³ loosely defined as the "right to be let alone."¹⁴ However, in the recent case of *Doe v. Commonwealth's Attorney*,¹⁵ the United States Supreme Court affirmed that the Virginia sodomy statute had a rational basis of state interest demonstrably legitimate so that homosexual relations carried on privately between consenting adult males could be prosecuted.¹⁶ The Court stated that the right to privacy concerned only issues relating to marriage, home, or family life.¹⁷ This decision may lend credence to the continued exist-

¹⁰ ALA. CODE tit. 14, § 106 (1959); ALASKA STAT. § 11.40.120 (Supp. 1975), *amending* ALASKA STAT. § 11.40.120 (1970); ARIZ. REV. STAT. ANN. § 13-651 (West Supp. 1976); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 26-2002 (Harrison Supp. 1972); IDAHO CODE § 18-6605 (Supp. 1976), *reenacting* IDAHO CODE § 18-6605 (1948); KAN. STAT. ANN. § 21-3505 (1974); KY. REV. STAT. § 510.100 (1975); MD. ANN. CODE art. 27 §§ 553-554 (1976); MASS. ANN. LAWS ch. 272, § 34 (1968); MICH. COMP. LAWS ANN. §§ 750.158, 338-338a (1968); MINN. STAT. ANN. § 609.293 (West Supp. 1976); MISS. CODE ANN. § 97-29-59 (1972); MO. ANN. STAT. § 563.230 (Vernon Supp. 1953); MONT. REV. CODES ANN. § 94-5-505 (MONT. CRIM. CODE Smith 1975); NEB. REV. STAT. § 28-919 (1975); NEV. REV. STAT. § 201.190 (1975); N.H. REV. STAT. ANN. § 632.2 (Supp. 1973); N.J. STAT. ANN. § 2A: 143-1 (West 1968); N.Y. PENAL LAW § 130.38 (McKinney Supp. 1975); N.C. GEN. STAT. § 14-177 (1969); N.D. CENT. CODE § 12.1-20-12 (1976); OKLA. STAT. ANN. tit. 21, § 886 (West 1958); 18 PA. CONS. STAT. ANN. § 3124 (Purdon Supp. 1973); R.I. GEN. LAWS ANN. § 11-10-1 (1970); S.C. CODE ANN. § 16-412 (1962); TENN. CODE ANN. § 39-707 (1975); TEX. PENAL CODE ANN. tit. 5, § 21.06 (Vernon 1974); UTAH CODE ANN. § 76-5-403 (Supp. 1975); VT. STAT. ANN. tit. 13, § 2603 (Equity 1974) (*see also* State v. La Forrest, 45 A. 225 (Vt. 1899); VA. CODE ANN. § 18.2-361 (Michie Supp. 1975); WIS. STAT. ANN. § 944.17 (West 1958); WYO. STAT. ANN. § 6-98 (Michie Supp. 1975), *amending* WYO. STAT. ANN. § 6-98 (Michie Supp. 1957).

¹¹ *See* text accompanying notes 36-42 *infra*.

¹² REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 25 (1957) [hereinafter cited as WOLFENDEN REPORT]; Hefner, *The Legal Enforcement of Morality*, 40 U. COLO. L. REV. 199 (1968); Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALB. L. REV. 84, 95-96 (1973); Comment, *supra* note 9, at 699.

¹³ *See* text accompanying notes 42-60 *infra*.

¹⁴ Davis v. United States, 328 U.S. 582, 587 (1946).

¹⁵ 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901, *rehearing denied*, 425 U.S. 985 (1976).

¹⁶ *Id.* at 1203.

¹⁷ *Id.* at 1200-02. *See* text accompanying notes 65-99 *infra*.

ence of these statutes¹⁸ as well as limit the right of personal privacy.

II. CRITICISM OF THE LAWS

Laws prohibiting private adult consensual homosexual intimacy have been subjected to a growing amount of criticism. The efficacy of such legislation is questionable, since there is doubt as to whether such laws can ever eliminate¹⁹ or "cure"²⁰ homosexuality in society. Furthermore, many of the major policy reasons that form the doctrinal basis of the criminal process are not served by these laws. The state does have an interest in removing dangerous people from society, but homosexuals and homosexuality do not constitute such a danger *per se*.²¹ It is also doubtful whether these laws serve to deter such private homosexual behavior.²² Whether such laws and their enforcement work to rehabilitate and reform a person's basic sexual

¹⁸ The Supreme Court's decision is contrary to an emerging trend in several jurisdictions to decriminalize private sexual behavior between consenting adults. See Fisher, *supra* note 8, at 111-12.

¹⁹ CHURCHILL, *supra* note 3, at 237; F. S. CAPRIO, VARIATIONS IN SEXUAL BEHAVIOR 294 (1955).

²⁰ There is still a controversy over whether homosexuality is a form of mental illness. Recently, the American Psychiatric Association removed homosexuality from their list of mental disorders. It is now considered a "sexual orientation disturbance" only for those homosexuals whose "sexual interests are directed toward people of their own sex who are in conflict with or wish to change their sexual orientation." N.Y. Times, Dec. 16, 1973, § 1 at 1, col. 1; *id.*, April 9, 1974, at 12, col. 4. Even if one assumes that homosexuality is a form of mental illness, "you don't successfully treat a neurosis by passing a law against its manifestations." Hefner, *supra* note 12, at 216. See also Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALB. L. REV. 84, 103 (1973); Fisher, *supra* note 8, at 112; Overview, *supra* note 7, at 289.

²¹ "Private adult homosexual conduct causes little or no harm to the community aside from the anxiety that homosexuals create among heterosexual citizens." Fisher, *supra* note 8, at 97. Homosexuals do not pose a threat to person or property. Furthermore, to point to instances of homosexual assault and conclude that homosexuality is dangerous *per se* would be similar to concluding that heterosexuality is dangerous *per se* by looking to the occurrence of heterosexual rape. Comment, *supra* note 9 at 691; Overview, *supra* note 7, at 289.

²² Sodomy statutes do not effectively deter homosexual behavior because they are seldom enforced and are easily evaded by those who engage in such behavior in private. Furthermore, in several countries that have either legalized homosexual activity or simply not enforced the laws against it, there has been no indication of any increase in homosexuality. See WOLFENDEN REPORT, *supra* note 12, at 24; Fisher, *supra* note 8, at 96-97; Overview, *supra* note 7, at 289-90; *cf.* Fisher, *supra* note 8, at 98-99, Comment, *supra* note 9, at 691.

orientation is also questionable.²³

Many reasons used by the states to justify their laws against homosexual behavior have been found to lack proper justification. Private consensual adult homosexual acts pose no threat to the societal institutions of marriage²⁴ and the family,²⁵ or to the state interest in maintaining an "effective citizenry."²⁶ State legislation prohibiting private adult consensual homosexual activities is not justified by a state interest in protecting the young from child molesters since homosexuals are not pedophiliacs.²⁷ Neither are state interests in preventing "promiscuity" and the spread of venereal disease served by these laws.²⁸ Finally, there is no evidence that the legalization of such activity would result in an increase of homosexuality²⁹ or would lead to the endangerment of the propagation of the human race, or result in the decline of civilization.³⁰

²³ Imprisoning an individual convicted for committing a homosexual act in a sexually segregated prison only acts to aggravate and strengthen the homosexual tendency. See *Pilpel*, *supra* note 4, at 66-67; *Overview*, *supra* note 7, at 290.

²⁴ Note, *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623, 629 (1961).

²⁵ WOLFENDEN REPORT, *supra* note 12, at 22; CHURCHILL, *supra* note 3, at 233-34; KARLEN, *supra* note 9, at 616; cf. SCHUR, CRIMES WITHOUT VICTIMS 110-11 (1965): "It is quite true that control over homosexuality serves to strengthen the position of the family and to re-enforce sex role differentiation. But this fact hardly provides a basis for wholesale legal and social persecution of inverts."

²⁶ Thus, while there may be certain functions, such as military service or jobs involving classified information for which homosexuals are presumptively unfit [due to possible disgrace or threat of blackmail], homosexuality apparently does not unsuit an individual for all or even most societal functions. Therefore, a ban on all homosexual activity will not significantly further the state interest in maintaining an effective citizenry.

Note, *supra* note 5, at 1634.

²⁷ WOLFENDEN REPORT *supra* note 12, at 23; Food, *Homosexuals and the Law: Why the Status Quo?*, 5 CAL. WEST L. REV. 232, 245-46 (1969); Note, *supra* note 24, at 628-29.

²⁸ Comment, *Sexual Freedom for Consenting Adults—Why Not?* 2 PAC. L.J. 206, 223 (1971).

State sodomy laws may even contribute to sexual promiscuity and the spread of venereal disease. "The prohibitions on homosexual conduct outlaw homosexual marriage, discourage stable relationships, and encourage furtive affairs. The prohibitions also contribute to the higher incidence of venereal disease among homosexual people by discouraging them from seeking treatment or diagnosis [I]nfected homosexuals are reluctant to incriminate themselves or their partners." Note, *supra* note 5, at 1632-33.

²⁹ WOLFENDEN REPORT, *supra* note 12, at 24; Fisher, *supra* note 8, at 100.

³⁰ CHURCHILL, *supra* note 3, at 233-34; SCHUR, *supra* note 25, at 110-11.

State laws proscribing private adult consensual homosexual acts are also criticized in that they are largely unenforced and unenforceable,³¹ as the crime for the act of "sexual misconduct takes place privately, or at least stealthily, leaving behind no damage and no complaining victim."³² The negative repercussions of having such unenforceable laws on the books are fivefold: First, the fact that they are largely unenforced tends to breed disrespect for the law;³³ second, when such laws are periodically enforced a situation is created whereby the police use "unsavory vice squad techniques" such as entrapment, raids on homosexual gathering places, stake-outs in public facilities and harassment;³⁴ third, these laws cause an unnecessary drain on limited police resources and morale, and even contribute to police corruption;³⁵ fourth, the potential for prosecution of these laws leaves homosexuals open to extortion, blackmail, and other forms of illegal exploitation;³⁶ and fifth, these prohi-

³¹ Fisher, *supra* note 8, at 111. SCHUR, *supra* note 25, at 79; Ploscowe, *Homosexuality and Crimes Against Nature*, in *HOMOSEXUALITY—A CROSS CULTURAL APPROACH* 401 (D.W. Cory ed. 1956). There have been several estimates made comparing the number of convictions for "crimes against nature" and the probable number of such acts. The estimates run from one conviction for every 2,500 acts to one for every 6,000,000 acts. KARLEN, *supra* note 9, at 613. There is some question as to whether society would want such laws enforced. "If anything even remotely resembling full and just enforcement of these laws were ever attempted, our prisons and houses of correction would be filled to overflowing before the first twenty per cent of the offenders had been apprehended." CHURCHILL, *supra* note 3, at 238. Kinsey estimated that if these laws were enforced, 95% of the white American male population would be convicted for violating these laws at least once. A. KINSEY, W. POMEROY, & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE*, 390-93 (1948).

³² WEST, *supra* note 9, at 84.

³³ CAPRIO, *supra* note 19, at 297; *Harris v. State*, 457 P.2d 638, 648 (Alas. 1969)(dictum).

³⁴ CHURCHILL, *supra* note 3, at 226, 228; KARLEN, *supra* note 9, at 610; SCHUR, *supra* note 25, at 79, 81, 114. "It was virtually impossible to arrest an individual for private sexual activity without exceeding search and seizure limitations." Comment, *supra* note 6, at 445.

³⁵ There have been instances when members of the law enforcement and legal communities have used the enforcement of sodomy statutes for their own corrupt ends. "Some magistrates and police have been known to yield to bribery, or even to encourage it, in the handling of these [sodomy] cases. The arrest and trial of homosexual citizens have become little more than a racket for the enrichment of unscrupulous police officers, bailbondsmen, lawyers, and magistrates." CHURCHILL, *supra* note 3, at 226. It has been said that such laws create a "climate of corruption." *Overview*, *supra* note 7, at 293 n.80. See SCHUR, *supra* note 25, at 114; WEINBERG and WILLIAMS, *supra* note 2, at 394; Comment, *supra* note 2, at 394; Comment, *supra* note 9, at 692.

³⁶ KARLEN, *supra* note 9, at 611; PLOSCOWE, *supra* note 31, at 404; SCHUR, *supra*

bitions indirectly sanction the existing discrimination against homosexuals in the field of employment, housing, and public accomodation.³⁷

Criticism of these laws has come from legal and medical circles.³⁸ Recently, there has been a movement in these cricles urging the decriminalization of private adult consensual homosexual acts. In 1957, the English Government's Committee on Homosexual Offenses and Prostitution issued the famed "Wolfenden Report" which recommended that English law be changed so that homosexual behavior between consenting adults in private no longer be a criminal offense, a recommendation later ratified by the Parliament.³⁹ Both the American Psychiatric Association⁴⁰ and the National Institute of Mental Health⁴¹ have called for liberalization of the state sodomy statutes. As early as 1955, the American Law Institute excluded from its Model Penal Code section on "Deviate Sexual Intercourse" all sexual practices not involving force, adult corruption of minors, or public offense."⁴² The 1970 Report of the National Commission on Reform of Federal Criminal Laws suggested that "homosexuality and other deviate sexual activity among consenting adults not be illegal."⁴³

note 25, at 114; WEST, *supra* note 9, at 102-03; Note, *supra* note 5; Comment, *supra* note 9, at 691.

³⁷ "Gay activists groups contend that the Constitution notwithstanding, known homosexuals meet discriminatory resistance when they try to rent apartments, book hotel rooms, and apply for jobs." N.Y. Times, Dec. 23, 1973, § 4 at 5, col. 1.

³⁸ KARLEN, *supra* note 9, at 612.

³⁹ WOLFENDEN REPORT, *supra* note 12, at 25. Although the report was submitted in 1957, the Parliament did not pass a bill calling for legalization of consensual adult homosexuality until 1967. Although it took ten years to enact the bill, reports showed that in 1967 almost two-thirds of the public were in favor of it, as compared to the previous thirty-eight percent in favor of reform in 1957. KARLEN, *supra* note 9, at 613.

⁴⁰ N.Y. Times, Dec. 16, 1973, § 1 at 1, col. 1; *id.*, § 1 at 25, col. 1.

⁴¹ NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT AND BACKGROUND PAPERS OF THE UNITED STATES TASK FORCE ON HOMOSEXUALITY 6 (1972) [hereinafter cited as NIMH REPORT].

⁴² MODEL PENAL CODE § 207.5 (Tent. Draft No. 4, 1955); *revised*, § 213.2 (Proposed Official Draft, 1962).

⁴³ FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS §§ 1643-1644 (1971). However, the proposed criminal code sections have not yet been enacted.

III. THE PRIVACY ARGUMENT

It has been said that an individual's right to privacy is the strongest argument for securing "constitutional protection for the private exercise of consensual adult homosexual activity."⁴⁴ Basically, the privacy argument in this context is that private consensual adult homosexual acts are included under the right of privacy as recognized by *Griswold v. Connecticut*⁴⁵ and extended by the cases of *Eisenstadt v. Baird*,⁴⁶ *Roe v. Wade*,⁴⁷ and *Stanley v. Georgia*.⁴⁸ With homosexual behavior protected by the constitutional right to privacy, the state must then prove a "compelling interest" to justify an interference with this right. Assuming that the state has no compelling interest, such state prohibitions would be struck down as unconstitutional.⁴⁹

In *Griswold*, the Supreme Court first declared that the Constitution guarantees a right of privacy.⁵⁰ The *Griswold* Court struck down a Connecticut statute forbidding the use of contraceptives on the ground that the statute was overbroad because it interfered with the marital relationship. In particular, the Court did not approve the idea of police searching "the sacred precincts of marital bedrooms for telltale signs of the use

⁴⁴ Note, *supra* note 5, at 1637. State statutes prohibiting "crimes against nature" have been challenged as unconstitutional on other grounds. See generally Note, *supra* note 5, at 1613 for a discussion of the due process and equal protection arguments, and *Wainright v. Stone*, 414 U.S. 21 (1973) on the question of vagueness.

⁴⁵ 381 U.S. 479 (1965).

⁴⁶ 405 U.S. 438 (1972).

⁴⁷ 410 U.S. 113 (1973).

⁴⁸ 394 U.S. 557 (1969).

⁴⁹ Several commentators have used this analysis. See *Overview*, *supra* note 7, at 295-97; Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALB. L. REV. 84, 92-96 (1973); Comment, *supra* note 9, at 687, 694-98; Comment, *supra* note 28, at 221-23.

⁵⁰ 381 U.S. at 479, 481-86.

The right of personal privacy is not explicit in the Constitution or in the Bill of Rights. There has been some difficulty in finding the exact origins of the right of privacy since the justices in *Griswold* differed as to its constitutional foundations. Justice Douglas, writing the opinion of the Court, based the right to privacy on the penumbras of the first, third, fourth, fifth and ninth amendments. *Id.* at 482-85. Justice Goldberg, concurring, put more emphasis on the ninth and fourteenth amendments. *Id.* at 487-93. Justice Harlan, concurring, disagreed with the reasoning of his brethren and stated that the right of privacy was so "implicit in the concept of ordered liberty" that it was protected from state infringement by the due process clause of the fourteenth amendment. *Id.* at 499-500.

of contraceptives.”⁵¹ The privacy concept established in *Griswold* was later extended by the Court to include relations outside marriage in *Eisenstadt v. Baird*.⁵² In this case, the Supreme Court struck down a Massachusetts statute that forbade the distribution of contraceptives to single individuals on the grounds that it violated the right of privacy and the equal protection clause of the fourteenth amendment.⁵³ The majority opinion suggested that the *Griswold* right of marital privacy was actually an individual right of privacy, stating:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own; but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁵⁴

In *Roe v. Wade*,⁵⁵ the right of privacy was extended to protect a woman's decision to have an abortion.⁵⁶ The Supreme Court held that the decision to terminate a pregnancy was a deeply personal matter of fundamental importance in the life of the decision maker.⁵⁷ Furthermore, the Court looked to the possible adverse medical and psychological effects that the anti-abortion statute inflicted, and found as a result that the law “may force upon a woman a distressful life and future.”⁵⁸

⁵¹ *Id.* at 485.

⁵² 405 U.S. 43 (1972). The right of privacy as enunciated in *Griswold* was limited to the marriage relationship, and *Eisenstadt's* expansion of that right beyond the marriage relationship to private individuals was thought by some commentators to safeguard private homosexual behavior. See Annot., 58 A.L.R.3d 638, 639-40 (1974); Note, *supra* note 5, at 1619; Comment, *Consensual Homosexual Behavior—The Need for Legislative Reform*, 57 Ky. L.J. 591, 595 (1969); *Hughes v. State*, 287 A.2d 299, 305 (Md. 1972).

⁵³ 405 U.S. at 446-55.

⁵⁴ 405 U.S. at 453; see also Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALB. L. REV. 84, 96 (1973).

⁵⁵ 410 U.S. 113 (1973).

⁵⁶ *Id.* at 153. The Court limited this right to the first trimester of the pregnancy. *Id.* at 163-64.

⁵⁷ *Id.* at 153-54.

⁵⁸ *Id.* at 152.

The right of privacy as enunciated in *Griswold* and extended in *Eisenstadt* and *Roe* can be used to protect private adult consensual homosexual acts from criminal prosecution. Both *Eisenstadt* and *Roe* speak in terms of an individual right or privacy dealing with the important decision of whether to "bear and beget a child."⁵⁹ An individual's decision to engage in homosexual behavior is just as important and deserving of personal privacy. One's sexual orientation is a personal matter, having a profound effect on one's life. "It influences his or her choice of friends, social activities and family relations, and bears on the decisions to marry and to procreate."⁶⁰ As such, it is a decision for the individual, not the state. Furthermore, as in *Roe*, state prohibitions in this area have adverse affects upon homosexuals outside of the criminal sanction. "The existence of legal penalties relating to homosexual acts means that the mental health problems of homosexuals are exacerbated by the need for concealment and the emotional stresses arising from this need and from the opprobrium of being in violation of the law."⁶¹

In addition, the ability of an individual to participate in private adult homosexual acts may be protected by the right of privacy of the home, as interpreted in *Stanley v. Georgia*.⁶² In that case, the Supreme Court decided that although the state has a justifiable interest in the regulation of obscenity, the state could regulate obscenity only as long as it did not interfere with an individual's possession and use of pornographic films in the home. Such an interference would be an unconstitutional invasion of a person's privacy in his home.⁶³ Using this line of reasoning, it could be argued that a state has insufficient justification for interference with consensual adult homosexual activities carried on in the privacy of an individual's home.⁶⁴

⁵⁹ 405 U.S. at 453; 410 U.S. at 154.

⁶⁰ Note, *supra* note 5, at 1620; *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1204 (E.D. Va. 1975)(dissenting opinion); cf. Comment, *supra* note 9, at 696.

⁶¹ NIMH REPORT, *supra* note 41, at 6; SCHUR, *supra* note 25, at 97-102; WEST, *supra* note 9, at 102; Note, *supra* note 5, at 1620.

⁶² 394 U.S. 557 (1969).

⁶³ 394 U.S. 557, 565-68 (1969).

⁶⁴ See *State v. Elliot*, 539 P.2d 207 (N.M. Ct. App. 1975), in which the New Mexico Court of Appeals held that N.M. STAT. ANN. § 40A-9-6 (prohibiting oral and anal sex

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The constitutional right of privacy has been used to challenge the constitutional validity of state laws prohibiting sexual acts of consenting adults involving both marrieds and unmarrieds, heterosexuals and homosexuals alike. These challenges have met with mixed results.⁶⁵ While some courts have held that this right of privacy could not be interfered with by such laws,⁶⁶ other courts have not extended privacy rights beyond the marital context⁶⁷ or have decided that the acts involved were not private⁶⁸ or consensual.⁶⁹ However, whether state laws could constitutionally prohibit private adult consensual homosexual activity was never so squarely addressed as in the case of *Doe v. Commonwealth's Attorney*.⁷⁰

In *Doe*, two adult male homosexuals⁷¹ brought a class ac-

as well as bestiality) was unconstitutional in that it invaded the right of privacy of the marital relationship, the privacy protecting the sexual relations of unmarrieds, and privacy of the home. *Id.* at 212-14. The New Mexico Supreme Court later reversed the lower court and upheld the constitutionality of the law in *State v. Elliot*, 551 P.2d 1352 (N.M. 1976), citing as the basis for its decision *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975). See text accompanying notes 72-112 *infra*.

See also *Ravin v. State*, 537 P.2d 494 (Alas. 1975), in which the Alaskan Supreme Court held that the state could not enforce its criminal laws against the possession of marijuana for the private, non-commercial use of marijuana in the home, since it would violate the right of privacy of the home. *Id.* at 500-16. *Ravin*, like *Stanley v. Georgia*, is another example of the right of privacy limiting the scope of the criminal prosecution.

⁶⁵ Note, *supra* note 5, at 1621.

⁶⁶ *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843, 851 (D.C. Md. 1973) (dictum); *In re Labady*, 326 F. Supp. 924, 927-28 (S.D.N.Y. 1971) (dictum); *Rittenour v. District of Columbia*, 163 A.2d 558, 559 (D.D.C. 1960); *State v. Pilcher*, 242 N.W.2d 348, 359-60 (Iowa 1976); *State v. J.O.*, 355 A.2d 195, 196-97 (N.J. 1976); *State v. Elliot*, 539 P.2d 207, 212-14 (N.M. Ct. App. 1975), *rev'd* 551 P.2d 1352 (N.M. 1976) (see note 64 *supra*).

⁶⁷ *Dixon v. State*, 268 N.E.2d 84, 86 (Ind. 1971); *Hughes v. State*, 287 A.2d 299, 305 (Md. Ct. Spec. App. 1972) (dictum); *Pruet v. State*, 463 S.W.2d 191, 195 (Texas Crim. App. 1971); see Annot., 58 A.L.R.3d 636, 639-40 (1974).

⁶⁸ *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976) (admittance of third person for a menage-a-trois violated the concept of marital privacy); *Smayda v. United States*, 353 F.2d 251, 257 (9th Cir. 1965) (the right of privacy does not encompass homosexual act in public toilet); *Raphael v. Hogan*, 305 F. Supp. 749, 756 (S.D.N.Y. 1969) (simulated acts of sodomy performed in public).

⁶⁹ *Towler v. Peyton*, 303 F. Supp. 581, 582-83 (W.D. Va. 1969) (petitioner forced act of sodomy on wife); *State v. Bateman*, 547 P.2d 6 (Ariz. 1976) (right of privacy not applicable because one party did not consent).

⁷⁰ 403 F. Supp. 1199 (E.D. Va. 1975).

⁷¹ The two homosexuals, using the pseudonyms of John Doe and Larry Roe, were aided by the A.C.L.U., the National Gay Task Force, and the Lambda Legal Defense

tion suit before a three judge district court⁷² asking that a Virginia statute prohibiting "crimes against nature"⁷³ be declared unconstitutional. Each plaintiff claimed that his constitutional right of privacy was violated by the statute as "applied to his active and regular homosexual relations with another *adult male, consensually and in private.*"⁷⁴ The plaintiffs also sought to enjoin the Commonwealth Attorney for the city of Richmond, Virginia, from enforcing the statute. The court held that the case was not a valid class action suit⁷⁵ and upheld the statute as constitutionally valid.⁷⁶

In upholding the Virginia statute, the majority of the court narrowly construed the right of privacy as granted in *Griswold* to pertain only to the marital relationship. The court reasoned that "homosexual intimacy" was not protected by the privacy right since it "is obviously no portion of marriage, home, or family life."⁷⁷ The opinion contained quotations from Mr. Justice Goldberg's concurring opinion in *Griswold*⁷⁸ and Mr. Justice Harlan's dissenting opinion in *Poe v. Ullman*⁷⁹ to show that while privacy protects the marital relationship, homosexual

and Education Fund. N.Y. Times, March 30, 1976, at 1, col. 8; *id.*, May 20, 1976, at 31, col. 2.

⁷² Pursuant to 28 U.S.C. § 2281 (1948).

⁷³ VA. CODE 18.1-212 (1950):

Crimes against nature. If any person shall carnally know in any matter any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

(Current version at VA. CODE § 18.2-361 (1975)).

⁷⁴ 403 F. Supp. at 1200. Plaintiffs relied on the first and ninth amendments for their privacy argument. See note 50 *supra*. Plaintiffs also claimed that the statute violated their fifth and fourteenth amendments' assurance of due process, their first amendment's protection of their rights of freedom of expression, and their eighth amendment's forbiddance of cruel and unusual punishments. However, this Comment will cover only the privacy argument since the district court addressed only this argument.

⁷⁵ *Id.* at 1200 n.1 and at 1203 (Merhige, J., dissenting).

⁷⁶ *Id.* at 1203.

⁷⁷ *Id.* at 1202.

⁷⁸ *Id.* at 1201; *Griswold v. Connecticut*, 381 U.S. 479, 498-99 (1965).

⁷⁹ 403 F. Supp. at 1201, 1202; *Poe v. Ullman*, 367 U.S. 497, 546, 552-53 (1961). In *Poe*, the Supreme Court dismissed an appeal contesting the constitutionality of the same Connecticut anticontraceptive law that it later struck down in *Griswold* on the ground that the case was non-justiciable.

activity is still "denunciability by the state."⁸⁰ Furthermore, the court found that the state interests served by the statute, those of promoting "morality and decency"⁸¹ and of preventing "moral delinquency," formed a "rational basis of state interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court."⁸² Finally, the court used the corroborative evidence of the prevalence of similar statutes in other states and the longevity of the Virginia statute as further testimony as to the legitimacy of the law.⁸³

District Judge Merhige in dissent stated that the majority had over-adhered to the facts of *Griswold* in interpreting the right of privacy.⁸⁴ He argued that any marital/non-marital distinction was destroyed in *Eisenstadt v. Baird*.⁸⁵ The *Eisenstadt* decision coupled with the reasoning in *Roe v. Wade*⁸⁶ led to the conclusion that:

[T]he right of privacy in sexual relationships is not limited to the marital relationship [I]ntimate personal decisions or private matters of substantial importance to the well being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category. The exercise of that right, whether heterosexual or homosexual, should not be proscribed by state regulation absent compelling justification.⁸⁷

Thus, the dissent placed the burden to prove a compelling justification on the defendants and then stated that they had made no effort to establish either a rational basis or a compelling state interest so as to justify the proscription of the statute.⁸⁸ Judge Merhige also stated that even with an arguable state interest in promoting "morality and decency," the plaintiffs would still be protected from state intrusion by the constitutional right of privacy of the home as enunciated in *Stanley*

⁸⁰ 403 F. Supp. at 1201.

⁸¹ *Id.* at 1202.

⁸² *Id.* at 1203.

⁸³ *Id.* at 1202-03.

⁸⁴ *Id.* at 1203.

⁸⁵ *Id.* at 1204; *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁸⁶ 410 U.S. 113 (1972).

⁸⁷ 403 F. Supp. at 1204.

⁸⁸ *Id.* at 1205.

v. Georgia.⁸⁹

After the district court's adverse decision petitioners exercised their right of direct appeal to the Supreme Court.⁹⁰ The Supreme Court did not grant plenary consideration to the case⁹¹ and, without benefit of oral argument and written opinion, summarily affirmed the district court's holding.⁹² By the simple use of the phrase "we affirm," the Supreme Court held that it is constitutionally permissible for a state to proscribe private homosexual activity between consenting adults.⁹³

The Supreme Court's summary affirmance of *Doe* is troublesome because it provides no explanation of the Court's reasoning about a matter of concern to many individuals. There is no doubt that *Doe* has precedential value for the state and lower federal courts,⁹⁴ but what is the precedent it establishes? Although the Supreme Court affirmed the judgment of the district court, the majority opinion of the latter court does not provide a binding *ratio decidendi* since a mere summary affirmance "does not indicate adoption of the opinion below."⁹⁵ As a result, lower courts will have difficulty applying this precedent to future cases.⁹⁶ Not only will lower courts have problems in discerning why the Supreme Court decided as it did,

⁸⁹ *Id.*; *Stanley v. Georgia*, 394 U.S. 557 (1969).

⁹⁰ Pursuant to 28 U.S.C. § 1253.

⁹¹ Only three Justices, Brennan, Marshall, and Stevens, voted to grant plenary consideration to the case. This was one vote short of the "rule of four" that determines whether such consideration will be granted to a case. 425 U.S. 901 (1976); see R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* § 5.16 (4th ed. 1969); Note, *Summary Disposition of Supreme Court Appeals*, 52 B.U.L. REV. 373, 396-402 (1972).

⁹² 425 U.S. at 901.

⁹³ The Supreme Court dismissed a later petition to rehear the case, 425 U.S. 985 (1976).

⁹⁴ STERN & GRESSMAN, *supra* note 91, at § 5.16; Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 309 n.9 (1969); Note, *supra* note 91, at 377, 410; Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 713 (1956) [hereinafter cited as *Per Curiam Practice*]; *contra*, Note, *supra* note 9, at 377.

⁹⁵ *Per Curiam Practice*, *supra* note 94, at 715. However,

[l]ower federal courts have also relied on such affirmances, but as with some state courts, there is a considerable tendency to look to the summary affirmance only after principally relying on the opinion of the lower court which was affirmed, and to utilize the citation to the per curiam only as a citation to the history of the case.

Id. at 714.

⁹⁶ Note, *supra* note 91, at 377, 407, 411-12; *Per Curiam Practice*, *supra* note 94, at 715.

they may also have difficulty determining the scope of that affirmance.⁹⁷ Perhaps the Supreme Court did agree with the reasoning used in the district court's majority opinion that Virginia had a legitimate state interest in branding homosexuality as criminal. Or *Doe* could be an extension of *Wainright v. Stone*,⁹⁸ a 1973 case in which the Supreme Court held that a Florida sodomy statute was not unconstitutionally vague. The Court could be refusing to extend the right of privacy beyond the "personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing."⁹⁹ It could have decided for all, none, or some of these reasons and it will be impossible to tell until the Court gives the reasoning for the decision.

VI. THE REPERCUSSIONS OF *Doe*

The Supreme Court's summary affirmance met with a mixed reaction. Conservative newspaper editorials said that the Court exercised proper judicial restraint in *Doe*,¹⁰⁰ while more liberal editors stated that the Court should have decided differently on the matter.¹⁰¹ Both civil liberties and "gay rights" groups were shocked by the holding.¹⁰² The criticisms made went not only to the substance of the Supreme Court's affirmance but went also to the Court's use of the summary affirmance device.¹⁰³

It is too early to tell what the long term effects of *Doe v.*

⁹⁷ "[T]here is considerable agreement that summary disposition often leaves uncertain what has been decided, *even where the court cites controlling authority*" (emphasis added). Note, *supra* note 91, at 411.

⁹⁸ 414 U.S. 21 (1973).

⁹⁹ *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 65 (1973); *Roe v. Wade* 410 U.S. 113, 152-53 (1972).

¹⁰⁰ Kilpatrick, *Judicial Restraint on Sex Laws*, *Times Picayune*, April 22, 1976, at 12, col. 2; *Wall St. J.*, April 5, 1976, at 12, col. 1.

¹⁰¹ *L.A. Times*, April 1, 1976, § 2, at 6, col. 1; *N.Y. Times*, March 31, 1976, at 40, col. 1.

¹⁰² *TIME*, April 12, 1976, at 50; *N.Y. Times*, Oct. 17, 1976, § 6 (Magazine), at 31, 98.

¹⁰³ *Doe* was

retrogressive enough, but it was made worse by the way in which the Court chose to reach that conclusion. Without hearing oral argument, without writing an opinion, the Court summarily affirmed the judges of a lower federal court—which was of course its legal right to do so, but not its social obligation.

Commonwealth's Attorney will be. It has been said that the decision constitutes a departure from the trend toward expanding the constitutional right of privacy.¹⁰⁴ In fact, *Doe* might even be a retrogression in regard to the right of privacy.¹⁰⁵ In *Lovisi v. Slayton*,¹⁰⁶ the Fourth Circuit Court of Appeals held that the Supreme Court's decision in *Doe* "necessarily confined the constitutionally protected right to privacy to heterosexual conduct, *probably even that only within the marital relationship*."¹⁰⁷ A similar interpretation of *Doe* was made in *State v. Elliot*.¹⁰⁸ This interpretation ignores the extension of privacy in the marital context found in *Griswold* to the non-marital situation found in *Eisenstadt v. Baird*. If this is the case, then state "sex crime" laws can also be applied to private heterosexual activity engaged in by unmarried consenting adults.

The decision constitutes a setback to a valid movement which seeks the decriminalization of private adult consensual homosexual behavior.¹⁰⁹ Those attempting to have such laws overruled in the courts now have to overcome the awesome weight of an adverse Supreme Court precedent. As a result, gay activists and their sympathizers will have to move their battle against state sodomy laws from the courts to the state legislatures,¹¹⁰ but even there, *Doe* may act to delay or defeat the legalization of homosexuality.

Tim O'Neill

¹⁰⁴ L.A. Times, April 1, 1976, § 2, at 6, col. 1; N.Y. Times, March 30, 1976, at 1, col. 8.

¹⁰⁵ N.Y. Times, March 31, 1976, at 40, col. 1; see THE NEW REPUBLIC, May 15, 1976, at 15; *id.*, May 29, 1976, at 13.

¹⁰⁶ 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976).

¹⁰⁷ 539 F.2d at 352 (emphasis added).

¹⁰⁸ 539 P.2d 207 (N.M. Ct. App. 1975), *rev'd* 551 P.2d 1352 (N.M. 1976) (see note 66 *supra*).

¹⁰⁹ CHRISTIANITY TODAY, April 23, 1976, at 36; L.A. Times, March 30, 1976, § 1, at 8, col. 1.

¹¹⁰ L.A. Times, March 30, 1976, § 1, at 1, col. 3; § 1, at 8, col. 1.